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THE ROBINSON-PATMAN ACT AND ANTITRUST POLICY: A TIME FOR REAPPRAISAL

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What has been learned from thirty years' enforcement of the Robinson-Patman Act? To answer that question Federal Trade Commissioner Elman calls for an objective and thorough study and reappraisal of the act in relation to basic antitrust goals and policy. The fundamental question is how a price discrimination law can operate to help attain the broader antitrust goals of achieving economic growth and progress while preserving and enlarging economic opportunity. Commissioner Elman points out the major problem areas which should be the subject of such a study, among them standards of competitive injury, cost justification, and the meeting competition defense. He suggests that the most critical question, whose solution may obviate many of the problems, is how to reorient enforcement policy to focus on the central evil at which the Robinson-Patman Act was aimed—the misuse of large buying power.

I. CALLS FOR REAPPRAISAL

During the thirty years since its enactment in 1936, the Robinson-Patman Act has been a subject of continuing controversy and concern. Fundamental questions about the act and its administration remain without satisfactory answers. Is there a basic conflict between the provisions of the act and a broader national antitrust policy? Is there an internal disharmony and confusion of policy goals within the act itself? Has the act suffered from weakness or inadequacy in enforcement? The act was primarily aimed at the exaction by large and powerful buyers of discriminatory price concessions not available to their smaller competitors. To what extent has the act succeeded or failed in achieving that objective? On balance, has the act helped more than hurt competition? In the light of thirty years' experience and the results obtained under it, should the provisions of the act and its present mode of administration be left intact? Or does sound antitrust policy require that changes be made—and, if so, what kinds of changes?

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A call for review and reappraisal of the Robinson-Patman Act and its administration has recently come from a most respected source: the National Commission on Food Marketing. In the final report which it submitted in June 1966 to the President and the Congress, the Commission stated:[1]

> Price discrimination continues to be a threat in the food industry to fair competition among buyers, and in some cases among sellers.... While the Robinson-Patman Act is widely viewed in the food industry as an important and necessary statute, it has shortcomings which endanger its effectiveness.... Concepts of competitive injury should be kept abreast of changing business practices, and the enforcement agencies should avoid routine use of statutes without regard to the significance of discrimination.
>
> *We conclude, therefore, that a study and reappraisal of the Robinson-Patman Act and its administration is now appropriate, in order to determine needed revisions in light of current economic conditions and overall antitrust policies.*

This conclusion was also shared by the minority members, who stated:[2] "We are pleased to agree. The Robinson-Patman Act and other antitrust laws do need early 'study and reappraisal' to determine their responsiveness to national needs."

The Supreme Court, in the *Automatic Canteen* case,[3] emphasized the need "to reconcile [the Robinson-Patman Act] ... with the broader antitrust policies that have been laid down by Congress." The Court has also recognized, however, that the task of achieving such reconciliation is too large to be borne solely by the judiciary.[4] The time has come, I submit, for the Federal Trade Commission to heed the strong and insistent pleas, which have come not only from the courts but from distinguished lawyers and economists,[5] for a searching reexamination of the Robinson-Patman Act and its administration.

From the standpoint of private practitioners engaged in preventive antitrust counselling, the problems involved in reconciling the requirements of the Robinson-Patman Act with those of the Sherman Act

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[1] NAT'L COMMON FOOD MARKETING REP. 107 (June 1966). (Italics in original.)
[2] *Id.* at 130.
[3] Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 74 (1953).
[4] FTC v. Henry Broch & Co., 363 U.S. 166, 177 (1960); Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).
[5] EDWARDS, THE PRICE DISCRIMINATION LAW 627-57 (1959) [hereinafter cited as EDWARDS]; ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT ix-xiii (1963) [hereinafter cited as ROWE]; Austern, *Isn't Thirty Years Enough*, 30 ABA ANTITRUST SECTION REP. 18 (1966); Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 ABA ANTITRUST SECTION REP. 9 (1966).

are serious and pressing. In a recent issue of the *Harvard Law Review*, an anonymous critic—who described himself only as "an aged and old-fashioned antitrust lawyer and law professor who still believes with Mr. Chief Justice Hughes that the Sherman Act is 'a charter of freedom' "[6]—stated that lawyers "compare their job in advising under [the Robinson-Patman Act] to the stability of a dog walking on his hind legs. Other lawyers say it is difficult to explain without using both hands, and often having to remove one shoe, because each new decision creates 'a new snake pit' of unsettled problems."[7]

As the Supreme Court stated in *Socony-Vacuum*,[8] price fixing threatens "the central nervous system of the economy." Businessmen who must operate in the pressures of the marketplace should not be forced to make pricing decisions at their peril. The legal standards which must be observed by businessmen in making pricing decisions in the day-to-day conduct of their business should be reasonable, realistic, and easily understood. Respect for law is not promoted if lawyers called upon to give advice in such matters have to throw up their hands in confusion or despair. If a businessman is advised that he can protect himself against a charge of violating the Robinson-Patman Act only by engaging in conduct which may subject him to prosecution under the Sherman Act, he is not the only one that suffers. The public is also the loser.

The goal of antitrust is compendiously expressed in a single word: competition. As the Supreme Court has stated, "competition is our fundamental national economic policy."[9] If, as many charge, the Robinson-Patman Act as administered serves mainly as an obstacle to effective competition, it is surely a matter of concern. And if, as others charge, the act has failed to prevent large buyers from obtaining unfair price discriminations which may injure or destroy competition, it is no less cause for concern. To be sure, the concept of "competition" embraces many and varied objectives. It is a means, however imperfect, of regulating markets and allocating resources in the most efficient way. It is a means for maximizing consumer satisfactions. It is also a means for achieving economic growth and progress, and for preserving and enlarging economic opportunity. How may a price discrimination law operate to help attain these goals? That is the fundamental question.

[6] 79 HARV. L. REV. 921 (1966).
[7] *Id.* at 922.
[8] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, at 226 (1940).
[9] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963).

And the answer, in all of its aspects, will come only after the Robinson-Patman Act and its administration are reexamined in the light of the national antitrust policy favoring competition.

Such a study should be a function of the agency which Congress has charged with primary responsibility for enforcing the act: the Federal Trade Commission. After thirty years of stewardship of the act, the Commission should render an accounting to the Congress and the public. It should take inventory of the successes or failure of the Robinson-Patman Act, measured by past and current experience. What is needed is a comprehensive and objective overview in which the forest is not obscured by the trees.

Any such study would involve the full commitment of the resources of the Commission and its staff. But it is also necessary that such a study, and the recommendations based upon it, be entirely free from any suggestion of institutional bias or predisposition. The answers to the difficult and serious questions that have been raised about the act will not spring full-blown from those of us who are immersed in the day-to-day chores of administration and adjudication of specific cases. If the study is to be of value—if it is to be influential in bringing about change where change is needed—it must merit respect for its impartiality and objectivity. Accordingly, it would seem appropriate that the study, at least in its initial phase, be conducted by a special task force consisting of leading economic and legal scholars in the fields of antitrust and industrial organization, who would have the full cooperation, as well as access to the resources and investigatory powers of the Commission. Perhaps the type of task force used by the Securities and Exchange Commission in its recent mutual fund and securities markets studies could be used as a model. At all events, I think it imperative that the Commission begin now the planning and organization of a full-scale review and reappraisal of the Robinson-Patman Act and its administration.

II. GENERAL OBSERVATIONS AND CRITICISMS

Despite the criticisms that have been made of the Robinson-Patman Act and its administration, there should be none as to the validity of the underlying premise on which Congress acted in passing the law. The act expressed a basic consensus that business rivalry in a free economy should not be unfair and destructive of the competitive process. It was premised, in part at least, on a recognition that there will always be large buyers who may attempt to abuse their power to the detriment not only of their smaller and weaker rivals but of the process of competition.

It could be said that the act was intended to limit competition among sellers, in the short run, in the hope of strengthening competition among buyers, in the long run. The "guiding ideal" of Congress in passing the law was "the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production."[10] As the Supreme Court stated in the *Sun Oil* case,[11] "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." Given an imperfect world, such a design involves no necessary inconsistency with basic antitrust policy, since the "competition" sought to be limited is unfair rivalry among unequals, a type of conduct that may lead to monopoly. Thus, the policy of the Robinson-Patman Act is rooted in a justifiable ethic: that it is unfair to competitors and injurious to competition for large buyers to use their power to exact discriminatory price concessions not available to smaller and weaker rivals.

From its very inception, however, the act and its administration have fallen under criticism and attack on all sides. Some of the assaults have indeed been extreme and unfair. The one that takes the prize is the indefensible charge that the sentiments giving rise to the act were "reminiscent of the beginnings of the Nazi movement in Germany, where the same zeal was displayed to protect the small businessman from his large competitors."[12] I shall not repeat other criticisms, which have been collected elsewhere,[13] except to note that the obscurities and inconsistencies of the act's language have invariably evoked unflattering comment. Mr. Justice Harlan was not alone in his recent reference to the act as "singularly opaque."[14] What I shall attempt here, rather, is to outline some of the basic questions of antitrust policy which have emerged from thirty years' enforcement of the act. These questions furnish a departure point for the study and reappraisal which is needed.

Criticism of the act has come mainly from two directions. On the one hand, it is said that the act "tends to be a price-fixing statute

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[10] H.R. Rep. No. 2287, 74th Cong., 2d Sess. 6 (1936).
[11] FTC v. Sun Oil Co., 371 U.S. 505, 520 (1963).
[12] Quoted in Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, 1 ABA Antitrust Section Rep. 60 (1952).
[13] 79 Harv. L. Rev. 921 (1966); Rowe 535 n.4 and Supp. (1964), at 168.
[14] FTC v. Sun Oil Co., 371 U.S. 505, 530 (1963) (separate memorandum).

hiding in the clothes of anti-monopoly and pro-competition symbols."[15] The argument here is that by emphasizing price uniformity, the act has in effect required the kind of price rigidity which the Sherman Act condemns. Indeed, Professor Adelman has argued that by focusing on discrimination as a *price* difference, the act is in direct conflict with the economic concept of discrimination and has resulted in the kind of misallocation of resources which characterizes a monopolistic, rather than a competitive, economy.[16]

Economic discrimination is not measured by differences in price alone; it can occur when prices are identical to all buyers. In economic terms, a discrimination is the receipt by a seller of different net returns on sales to different buyers. Thus, if *X*'s costs of selling to buyer *A* are significantly lower than selling to buyer *B*, but *X* charges the same price to both, a serious economic discrimination has been effected against buyer *A* even though there has been no price discrimination.

In a competitive economy, Professor Adelman points out, "there would be a strong tendency for the sellers to bid this higher-margin business away from each other, forcing down the margin toward equality with the other customers."[17] It is by this process in a competitive economy that resources are channeled to the most efficient methods of doing business and prices are reduced. A law which, in the guise of preventing *price* discrimination, limits the reduction of prices that eliminate *economic* discrimination blocks the proper functioning of the competitive process. The consequence will be that efficiency is not rewarded and prices remain rigidly high. In short, it is asserted, a law which unduly discourages price differences to different customers throws the competitive system out of gear. In the view of many, this has been the actual effect of the Robinson-Patman Act.

On the other hand, many have argued that the act has failed in its primary objective—to prevent large buyers from gaining decisive advantages over their competitors through the exaction of economically unjustified price concessions. Such criticism has been aimed, in part, at allegedly misguided Commission enforcement policies. It has been contended that the impact of Commission enforcement has fallen mainly on small sellers rather than big buyers, and that it has con-

[15] Levi, *supra* note 12, at 61.
[16] Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. Pa. L. Rev. 222, 223-27 (1955); see also Schniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 Nw. U.L. Rev. 173 (1962).
[17] Adelman, *supra* note 16, at 234.

cerned itself too much with the insignificant or trivial.[18] But the criticisms in this regard have also been directed at the act itself.

Despite the concern with the exercise of large buying power which motivated its enactment, the central focus of the act as written is upon the conduct of the seller. It has also been pointed out, and this is a matter which I will come back to, that the good faith defense—which enables sellers to meet the equally low price of their competitors—contains a built-in provision which is favorable to large buyers and increases the likelihood of their obtaining discriminatory price advantages over small competitors.[19] Some question has also arisen as to whether section 2(f), the section directed at buyers, imposes too heavy a burden of investigation and proof upon the Commission, thereby discouraging attempts to enforce the law against large and powerful buyers.

Finally, there is a variety of ways in which a large buyer can avoid the act altogether. A discriminatory price to a large buyer which can be cost-justified is entirely outside the prohibitions of the act. In addition, a large buyer can get around the act by taking a seller's entire output at a very low price not available to others. Professor Edwards recently concluded that both camps of critics—those who criticized the act's anticompetitive tendencies and those who criticized its failure to curb the anticompetitive abuses of buying power—were essentially correct. On the one hand, he pointed out that:[20]

> Discrimination that damages competition has been hard to distinguish from competition that merely recognizes and reacts to the varying intensity of competition in imperfect markets. For this reason, the law has handicapped sellers in responding flexibly to varying circumstances and has given rise to enduring controversy about the proper limits of the right to discriminate in order to meet competition. Discrimination that is an incident in the process by which price changes spread has been hard to distinguish from discrimination that creates enduring competitive advantages. For this reason the law has created hazards for those who try to drive hard bargains. Discrimination sometimes produces mixed effects, enhancing competition among oligopolistic sellers while diminishing it among their customers. Under such circumstances, the law condemns the diminution and ignores the enhancement. Because of the law's inherent ambiguities, businessmen can now vary their selling prices or haggle over buying prices only with caution and under legal guidance.

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[18] EDWARDS 624-28; ROWE 539-43; Note, *Small Business Before the Federal Trade Commission*, 75 YALE L.J. 487 (1966).

[19] EDWARDS 569-71, 580-83.

[20] Edwards, *Control of the Single Firm: Its Place in Antitrust Policy*, 30 LAW & CONTEMP. PROB. 465, 476-77 (1965).

> Whether, on balance, the law has maintained more competition than it has impaired is uncertain.

On the other hand, after enumerating the ways in which a large buyer can avoid the restrictions of the Robinson-Patman Act, he concluded that:[21]

> [the act] has been a weak instrument with which to prevent whatever concentration of economic power may result from discrimination. Its principal achievements have been equitable—diminution of various inequalities in the terms of trade available to weak distributors. The degree of this achievement has tended to be greatest in eliminating discriminations that were not very important to corporate empire-builders.

The source and extent of these criticisms surely demonstrate the need for taking a good long look at how the Robinson-Patman Act is actually working out. Even the severest critics of the act seem to agree that price discrimination could be used as a potent weapon for the destruction of competition, although some doubt has been expressed as to the extent it has actually been used for that purpose in the past.[22] Theoretically at least, a powerful national seller might, out of monopoly profits derived in some markets, subsidize a selective use of lower prices in other markets in order to eliminate or discipline competitors in those markets. Our early antitrust history reflects the belief that such price discriminations were used for predatory purposes by the great trusts.[23] A large buyer might also exploit its power to obtain substantial and significant price concessions enabling it to eliminate or discipline competitors. The belief that such practices were in fact being used by large chains to impair competition in the retail food industry was the premise on which the Robinson-Patman Act was enacted.[24]

I think we could all agree that a price discrimination law aimed at practices so destructive to competition is fully consistent with, and complementary to, the goals of our antitrust laws. At the same time, we could also agree that all differences in price cannot be condemned

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[21] *Id.* at 477.

[22] See Adelman, *supra* note 16, at 232-33; McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case,* 1 J. LAW & ECON. 137 (1958); McGee, *Some Economic Issues in Robinson-Patman Land,* 30 LAW & CONTEMP. PROB. 530, 546-48 (1965).

[23] Standard Oil Co. v. United States, 221 U.S. 1 (1910); United States v. American Tobacco Co., 221 U.S. 106 (1911).

[24] See *Federal Trade Commission Final Report on the Chain Store Investigation,* S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

as anticompetitive. First, differences in price which reflect the passing on to a buyer, in the form of lower prices, of savings flowing from its more efficient methods of doing business are essential to the maintenance of a competitive system. Such lower prices are rewards to the efficient; their elimination would remove or lessen the incentive for increasing efficiency and reducing ultimate costs to the consumer. Second, price differences will naturally arise from the ordinary pressures of everyday bargaining and haggling in a competitive market. A price discrimination law which results in the elimination of such pressures would impair or obstruct the competitive process. Especially in a sellers' market that is oligopolistically structured, the ability of a few buyers to obtain lower prices may be the only way in which a general reduction of prices in such a market can come about.[25] In short, there is a compelling need to distinguish between those discriminations in price which may injure competition and those which reflect active and vigorous pressures of competition and which are a necessary concomitant of a healthy competitive system.

Against the background of these general observations and criticisms that have been made concerning the act, I should like to turn to some specific problems which reflect the major areas of tension and conflict between antitrust goals and the price discrimination law.

III. Standards of Competitive Injury in Price Discriminations

While price discrimination within the meaning of the act is "merely a price difference,"[26] the central prohibition of the act makes unlawful only those discriminations in price between purchasers of commodities of like grade and quality whose effect may be (a) "substantially to lessen competition or tend to create a monopoly," or which (b) "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them." The first standard is a familiar Clayton Act standard; the second is a novel definition of injury which was added by the Robinson-Patman amendments to the Clayton Act.

At the secondary line of competition—that is, the buyer's level—a very narrow concept of competitive injury has prevailed. Essentially,

[25] Att'y Gen. Nat'l Comm. Antitrust Rep. 336 (1955) [hereinafter cited as Attorney General's Report]; see Dirlan & Kahn, Fair Competition: The Law and Economics of Antitrust Policy 204 (1954); Rowe 25-28.
[26] FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960).

any price difference which is substantial in relation to industry profit margins is likely to be held sufficient to establish the competitive injury required by the act.[27] There are clear indications that mechanical and dogmatic applications of this standard will not go unchallenged in the courts. In the *Sun Oil* case, for example, the Supreme Court admonished that "in appraising the effects of any price cut . . . both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis. . . ."[28] But such judicial expressions do not appear as yet to have had significant impact on the decisional standards applied by the Commission.[29]

The application of this formula at the secondary line raises two important questions: The first relates to a so-called "pure" secondary-line case involving the legality of a price difference extended to buyers who function and compete only at a single level of distribution. The other relates to the so-called functional discount paid to a vertically integrated buyer who operates at two or more levels of distribution and who competes with unintegrated buyers who sell only at the lower level of distribution.

In the "pure" secondary-line case, the problems of defining injury to competition may not appear at first glance to be important. Where a price concession gives one buyer a substantial price advantage over another, one may ask whether further inquiry is necessary to ascertain if competition in any broad market sense has been injured. I think the question is worth asking and deserves answer. First, the assumption that the cost justification proviso adequately assures buyers the rewards of efficiency must be critically appraised. If it does not, and if it is not feasible to construct a workable cost justification proviso, the definition of competitive injury at the secondary line would assume greater significance. A more pliable definition, permitting greater flexibility in pricing, would tend to assure that a price discrimination law does not promote economic discriminations—creating undue uniformity in the face of differing degrees of efficiency.[30] I will presently examine the question of the adequacy of the cost justification proviso.

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[27] FTC v. Morton Salt Co., 334 U.S. 37 (1948).
[28] FTC v. Sun Oil Co., 371 U.S. 505, 527 (1962); see also American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1963).
[29] See, *e.g.*, Alhambra Motor Parts, No. 6889, FTC, Dec. 17, 1965.
[30] See McGee, *Some Economic Issues in Robinson-Patman Land*, 30 LAW & CONTEMP. PROB. 530, 542 (1965).

For the moment, I merely wish to indicate the relationship of that question to the determination of the appropriate standards of competitive injury.

There is additional reason for policy concern about the narrow definition of competitive injury in a so-called "pure" secondary-line case. It cannot be too often stressed that a price discrimination cannot be looked upon solely in terms of its effect at the secondary line. A difference in price might confer some transient advantage upon a favored buyer and yet at the same time reflect healthy and vigorous competition at the seller level—the so-called primary line—or the initiation of a much needed price break at the seller level. Moreover, temporary and shifting price discriminations, even of a substantial nature, are not necessarily injurious to competition but may reflect instead the kind of bargaining and haggling which is an essential part of the competitive process. In competitive markets some buyers may obtain a price advantage on one item while others obtain a counter-balancing advantage on another. Where there is no central pattern in these discriminations, where they are temporary or sporadic, or where they tend to cancel each other out, they are not likely to produce any harmful effect upon the competitive process. To the contrary, they merely reflect varying pressures within a vigorous and healthy competitive market. An inflexible or doctrinaire definition of competitive injury prohibiting price differentials in such circumstances would dampen competitive vigor. It would create too onerous a peril both to the exercise by buyers of the "sturdy bargaining" which a competitive system encourages and to competitive responses by sellers to differing and changing pressures within the market.[31]

A perhaps more pressing question raised by the standards of competitive injury applied at present under the Robinson-Patman Act relates to the treatment of functional discounts—price concessions intended to compensate for the performance of distribution functions—given to integrated buyers competing at more than one level of the distribution process. Ordinarily, sellers competing at different functional levels in the distribution system do not compete with one another. As a consequence, a lower price to a competitor at a higher functional level in the distribution system could not injure competition. For example, wholesalers ordinarily receive a lower price than retailers; no one is concerned that this raises a problem under the

[31] EDWARDS 540-44, 638-43.

Robinson-Patman Act.[32] Vertical integration, however, does create problems. Where the same firm competes at two separate levels of distribution, it will find itself in direct competition with unintegrated sellers competing only at the lower level. The Commission has traditionally treated such an integrated distributor as if it competed at the lower functional level only, and has consistently and mechanically applied the *Morton Salt* formula for determining injury in secondary line cases.[33] It has wholly ignored the fact that these integrated firms compete at a higher level as well and that the effect of applying such a simplistic definition of competitive injury may be to prevent the integrated firm from competing at the higher level. As some critics have observed, by imposing a serious risk of law violation upon the charging of lower prices designed to induce and compensate the performance of additional distribution functions, the act tends to discourage experimentation with new systems of marketing which may eliminate or by-pass traditional avenues of distribution and thus may contribute to marketing efficiency and to the overall enhancement of competition.[34]

I find nothing in the Robinson-Patman Act which indicates that it was intended to prevent a manufacturer from obtaining distribution through as many functionally distinct channels as his business needs require. A legitimate functional price discount is the incentive which a manufacturer offers his distributors to induce them to render distribution services which he may regard as necessary to increase efficiency, lower costs, or expand consumer demand for his products. A thorough reevaluation of the narrow standards of competitive injury applied in this area is vitally needed. As I recently pointed out, "competition, in the antitrust sense, may be truly injured by a policy of law enforcement which preserves intact an inefficient, uneconomical and stratified system of distribution, and prevents the elimination of unnecessary middleman costs . . . ."[35]

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[32] *But see* Standard Oil Co., 41 F.T.C. 263 (1945), *modified*, 43 F.T.C. 56 (1946), *modified*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951); Rowe 198-205.

[33] See, *e.g.*, Purolator Prods., Inc. v. FTC, 352 F.2d 847 (D.C. Cir. 1965) (petition for cert. pending); National Parts Warehouse, No. 8039, FTC, Dec. 16, 1963, *aff'd sub nom.* General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir. 1965); Monroe Auto Equip. Co., No. 8543, FTC, July 29, 1964, *aff'd sub nom.* C.A. Monroe Auto Equip. Co. v. FTC, 347 F.2d 401 (7th Cir. 1965), *cert. denied*, 382 U.S. 1009 (1966); Alhambra Motor Parts, No. 6889, FTC, Dec. 17, 1965 (appeal pending in Ninth Circuit).

[34] Dirlan & Kahn, Fair Competition: The Law and Economics of Antitrust Policy 132-33 (1954); Edwards 344-47; see Attorney General's Report 207-09.

[35] Alhambra Motor Parts, No. 6889, FTC, Dec. 17, 1965 (dissenting opinion).

There is a third area in which a reappraisal of standards of competitive injury is urgently needed—"area price discriminations." Firms operating in a number of geographic markets often charge different prices in different markets depending on the local conditions. Such pricing may be essential to, and promote, competition in local markets; an overbroad restriction of area price differences could seriously impair competition.

In a local market dominated by a few firms, the entry of a national seller prepared to lower its price in order to secure a foothold in the market may be the only cure for a rigid price structure characteristic of oligopoly. Such a national seller may be unwilling to lower its price in such a local market if it is required to make the same price reduction in all the other geographic markets in which it does business. Selective local price cutting may also be a necessary first step in a general lowering of prices. A national seller, reluctant to initiate a uniform and general price reduction, might want to experiment with a price reduction in one or several local markets before establishing it throughout its entire marketing area. In general, a lack of uniformity in the prices of a national seller, competing in many geographic markets, may simply reflect the seller's flexibility in adjusting price to meet different competitive conditions in different markets. Insistence on price uniformity in such situations could lead to high, rigid prices and thereby hurt competition seriously.

On the other hand, selective local price cutting by national firms possessing monopoly power in other markets could be used as a weapon to eliminate or discipline competitors. The line between area price discrimination which is predatory or destructive of competition and that which promotes or expands competition is obviously difficult to draw. But one thing is certain: it cannot be drawn merely at the point where a price reduction diverts trade from a competitor. "[S]uccessful competition necessarily diverts business from rivals. To make such diversion unlawful is tantamount to a complete prohibition of the tactics of making price reductions or price increases that result in nonuniform prices."[36] It is a natural consequence of competition that some competitors will lose business and some will even fall by the wayside.

It should be clear, therefore, that a simple test of whether a price reduction results in a diversion of business cannot suffice for deter-

[36] EDWARDS 637.

mining injury to competition among sellers.[37] The Federal Trade Commission seems to have begun to move away from any such per se approach to area price discrimination.[38] Unfortunately, current decisions do not as yet reflect sufficient sensitivity to the difficult problem of drawing a line between area price discrimination which impairs the competitive process and that which promotes and fosters vigorous competition at the primary line.[39] With no clear guide as to whether a particular local price reduction is likely to be adjudged injurious to competition, sellers must proceed at their own risk. An atmosphere of such peril can only inhibit normal competitive responses and injure the process of competition. Area price discrimination is, therefore, a prime subject with which a reappraisal of the statute should be concerned.

IV. Cost Justification

As the legislative history of the act shows, Congress sought to assure that the prohibition of price discrimination would not prevent the development of efficient distribution methods or deprive buyers of the rewards of lower prices which are the incentives for seeking more efficient methods. For that purpose, Congress included the cost justification proviso.[40] Nevertheless, opinion is almost unanimous that the cost justification proviso has not fulfilled its function and is practically useless to businessmen, accountants and lawyers.[41] As the Supreme Court noted, "proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified."[42]

The cost justification proviso as currently enforced has been criticized on a variety of grounds. Some have suggested that the cost

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[37] See, *e.g.*, Borden Co. v. FTC, 339 F.2d 953 (7th Cir. 1964); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961); *FTC Policy Toward Geographic Pricing Practices*, 1 Trade Reg. Rep. 5341, 5348 (Oct. 12 ,1948).

[38] Dean Milk Co., No. 8032, FTC, Oct. 22, 1965; Lloyd A. Fry Roofing Co., No. 7908, FTC, July 23, 1965; Forster Mfg. Co., No. 7207, FTC, July 23, 1965.

[39] Dean Milk Co., *supra* note 38.

[40] Remarks of Rep. Utterback, 80 Cong. Rec. 9417 (1936):

> The bill assures to the mass distributor, as to everyone else, full protection in the use and rewards of efficient methods in production and distribution.... There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which those economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible.

See also H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936).

[41] See, *e.g.*, Fennelly, *On the Judging of Mince Pies*, Harv. Bus. Rev., Nov.-Dec. 1964, p. 77.

[42] Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 79 (1953).

factors which it permits to be shown are too limited and that recognition is not given to legitimate efficiencies and savings resulting from sales to large buyers, such as efficiencies which result from the greater utilization of plant capacity.[43] The main criticism, however, has been that the failure to develop realistic and clear standards for the determination of cost savings has made it impossible for businessmen or their accountants to make practical use of the cost justification defense in determining pricing policies.

The difficulties confronting a firm seeking to establish a cost justification are many: it must establish that the classes of customers to whom different prices are charged are sufficiently homogeneous with respect to the methods and nature of their buying practices, and it must then make an appropriate allocation of costs to the particular classes. As has been pointed out, ordinarily "a firm's expenditures comprising the differences in cost as between alternative methods of distribution are typically spread among numerous products in varying ways; the breakdown of these 'joint' costs among several components involves largely subjective business judgments in choosing among several equally rational alternative methods of allocation."[44] Accordingly, it has been recognized that these elements are "not suitable for periodic entry in a seller's regular books of account,"[45] and that the data necessary for a Robinson-Patman cost defense cannot be obtained from ordinary business records.[46]

There have been repeated calls for clearer guidelines which would enable businessmen to make adequate use of the cost justification defense, as well as recommendations that there be greater flexibility in determining the adequacy of a cost defense. A 1956 study of the cost justification proviso, made at the request of the Commission, urged broader interpretation, greater acceptance of sampling procedures, more leniency for cases in which anticipated costs turned out differently from actual costs because of circumstances beyond the control of the seller, and wider acceptance of approximate cost justifications. But that study failed to come up with adequate specific criticisms or suggestions for improvements of the cost defense which would make it more available and better able to serve its essential function of promoting and preserving efficiencies in the distribution process.[47] A re-

[43] EDWARDS 613-15; McGee, *supra* note 22, at 538-42.
[44] ATTORNEY GENERAL'S REPORT 174.
[45] *Ibid.*
[46] Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 68 (1953).
[47] EDWARDS 608-16; TAGGART, COST JUSTIFICATION 543-49 (1959).

appraisal of the act would therefore necessarily include a thorough reexamination of the cost justification proviso and its role as a means of assuring that the price discrimination law does not penalize or discourage the development of efficient methods of distribution and that it does not function, as some have charged, as a method of perpetuating economic discrimination.[48]

V. Meeting Competition Defense

No issue has produced more serious collisions between antitrust policy and the Robinson-Patman Act than the determination of the scope and availability of the meeting competition defense. Professor Edwards has said that the good faith defense has been "criticized as too narrow and as too broad, as insufficient and excessive, and as a curb on competition both in its narrowness and its breadth. These apparently contradictory sets of appraisals are both substantially correct."[49] The conflict between antitrust policy and a law aimed at curbing excessive buying power which may be used to impair competition at the buyer's level is readily perceived in this context. Sound antitrust policy would dictate that sellers be free to price their goods flexibly in response to competitive pressures. In the Supreme Court's view, the maintenance of such freedom to meet competition is essential if we are to avoid the conclusion that Congress in the Robinson-Patman Act sought "to abolish competition" and to undermine the very premises of the Sherman Act.[50]

At the same time, the maintenance of competition among sellers may have little relevance to the maintenance of competition among buyers. Indeed the two may be in direct and open conflict. For while the right to meet a competitor's price is essential to the survival of a seller, such meeting of competition may also reflect the securing of substantial price advantages by large buyers. In many ways the meeting competition defense may actually operate to favor the big buyer over the small buyer and to assure that the impact of the act will fall most heavily on the small buyer. It is most often the large buyer whose quantity buying and buying methods permit at least some sellers to realize savings in cost. Even if only one seller realizes such savings entitling it to charge a lower price to a particularly large buyer, the meeting competition defense permits all other competing sellers to

[48] Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. Pa. L. Rev. 222, 235-36 (1955).
[49] Edwards 580.
[50] Standard Oil Co. v. FTC, 340 U.S. 231, 249-50 (1951).

meet that lower price regardless of whether they can provide cost justification.

Similarly, a large buyer can frequently buy the entire output of a single seller—and this frequently does occur in the food industry. The price charged by a seller in such a case is not limited in any way by the restrictions of the Robinson-Patman Act. Again, all other sellers may meet this price even if it does not reflect any savings in cost. Finally, it is the large buyer who can frequently exert sufficient pressure to induce somebody to give him a price concession. Other sellers may respond on an industry-wide basis to meet such a concession. Thereafter it may be impossible to determine which of the sellers was the initiator and which were merely responding defensively.[51]

In each of these situations, regardless of whether the sellers' lower prices are good faith responses to a competitor's price and regardless of whether such responses are essential to the maintenance of competition at the seller level, competition at the buyer level may be very seriously impaired. Dissatisfaction with these results has led to unsuccessful legislative efforts to revise the meeting competition defense so as to qualify its use in those cases where there is a substantial impairment of competition in the traditionally broader Clayton Act sense—that is, where the effect is substantially to lessen competition or to tend to create a monopoly.[52]

This conflict between the objectives of maintaining competition at the seller level and at the buyer level may explain the evolution of a number of doctrines which have, in their turn, significantly impaired the usefulness of the meeting competition defense as a means for protecting competition at the seller level. If the meeting competition defense is to have any practical meaning, it must be given a flexible interpretation enabling sellers to act promptly in response to the exigencies of competition. Sensitivity to the realities of everyday commercial life, not rigid standards imposing unrealistic and impossible duties of inquiry and prediction on businessmen, is essential if the defense is to have any substance. Pragmatism, not strict logic, must be the keynote to interpretation. The standard of "good faith" must be "simply the

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[51] See Callaway Mills Co., No. 7634, FTC, Feb. 10, 1964 (dissenting opinion), *rev'd*, 362 F.2d 435 (5th Cir. 1966).

[52] See, *e.g.*, S. 11, 88th Cong., 1st Sess. (1963). The bills introduced would have made the meeting competition defense an absolute one in those cases where a discrimination merely tended to "injure, destroy, or prevent competition with" the buyer's competitors, but would have permitted the Commission to disregard the meeting competition defense where the effect of the price discriminations was "substantially to lessen competition or tend to create a monopoly." See generally ROWE 256-64.

standard of the prudent businessman responding fairly to what he believes is a situation of competitive necessity."[53]

Instead, the act has very often been read to impose unreasonable burdens upon businessmen. Such interpretations appear to some to reflect a basic hostility towards the good faith defense. Despite earlier indications that the Commission might be adopting a more flexible approach, recent actions indicate that the 2(b) defense still does not perform its legitimate role.

The first obstacle to effective use of the defense is the doctrine that a seller is not in good faith if he meets a price which he knows, or has reason to believe, is unlawful. Precisely what burden does this impose upon the seller? Where the defense is invoked, must complaint counsel come forward and show circumstances which would have indicated to a reasonable seller that the price he was being asked to meet was unlawful? Or does the burden rest upon the seller invoking the defense to establish that he had reason to believe that the price he was meeting was lawful? Or must he merely show that there were not circumstances which would have reasonably led him to believe that the price he was meeting was unlawful? Surely, any standard which is constructed should give recognition to the fact that a businessman who has no access to his competitor's records can hardly be expected in the ordinary case to be capable of establishing in advance, and midst the hurly-burly of the marketplace, the lawfulness of his competitor's prices, a question which can usually be determined only after extensive inquiry conducted long after the event. As I have said elsewhere:[54]

> The law should not be construed as forcing a seller to compete at his peril. A "sales manager who is trying to compete... is not, of course, required to become a detective or a judge." A businessman who must operate in the pressures of the marketplace cannot be expected to conduct a survey into his competitor's costs or to prophesy whether the competitor's lower price will later be held unlawful.

Moreover, a serious question has been raised as to whether there should be rigid and absolute insistence that the price met must be a lawful one. Commissioner MacIntyre has said that "the right of self-defense long recognized is available only to counteract wrongful and unlawful conduct.... This inconsistency between recognized right of self-defense and what has been provided in the way of self-defense

[53] Continental Baking Co., No. 7630, FTC, Dec. 31, 1963.
[54] Tri-Valley Packing Ass'n, 60 F.T.C. 1134, 1176 (1962) (dissenting opinion).

under the 'good faith proviso' is left unexplained by the [Supreme] Court and the Commission."[55]

A second obstacle to the meaningful use of the good faith defense is the dogma that a seller must establish that he was meeting a particular price in a specific competitive situation and that he cannot meet so-called pricing systems or general price levels. It is true that the literal language of the statute permits the defense only to meet the "equally low price of a competitor." However, the courts have traditionally given this language a common-sense reading. The Supreme Court has pointed out that section 2(b) "does not place an impossible burden upon sellers,"[56] and the First Circuit, in reversing a Commission holding that a seller must affirmatively show that he knew the exact prices of competitors and the names of the competitors who bid the price that he was meeting, recently said:[57]

> We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place. The Commission's requirement is unrealistic.

The recent *Callaway Mills* decision[58] in the Fifth Circuit, rejecting the Commission's holding that meeting a competitor's discount schedule does not satisfy the good faith defense, is the latest chapter in this story.

Yet, despite the repeated efforts of the courts to inject a note of realism into the interpretation of the meeting competition defense, the administration of the law appears to remain unaffected. How, for example, can one harmonize with *Forster* and *Callaway Mills* the view that "general" testimony that price discriminations were made to meet competition, "without documentation or specific evidence," is never sufficient to support a good faith defense, and that to establish the defense the respondent must show that he "used reasonable diligence

[55] Continental Baking Co., No. 7630, FTC, Dec. 31, 1963, at 4 (separate opinion of Commissioner MacIntyre).
[56] FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945).
[57] Forster Mfg. Co. v. FTC, 335 F.2d 47, 55-56 (1st Cir. 1964).
[58] Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966).

in verifying the existence of a lower price to a competitor"?[59] How does one verify a competitor's price? Suppose that a buyer tells his supplier that he must grant him a six percent discount off list price or lose his business to a competitor. Under the prevailing view, the seller presumably cannot accept the buyer's statement at face value, even though its obvious purport is that a six per cent discount is necessary to meet the competitor's price. Would you counsel your client to call his competitor, ask him what price he is charging, and then charge exactly the same price? Or would you be afraid that your advice might lead your client straight to an indictment for illegal price fixing? And just what would be happening to the customer while your client is wandering about making diligent efforts to verify the competitor's price which he has been told either to meet or "get out"?

Suppose too that your client's competitor publishes a new volume discount schedule. Is your client within the good faith defense if, being generally aware that his list prices are similar to his competitor's, he simply adopts the new discount schedule published by his competitor? Or is he meeting a "pricing system"? If so, how else can he practically meet his competitor's new low prices?

Should not "price" in the meeting competition defense receive a flexible interpretation enabling a seller to meet the necessities of competition? The Commission has held, for example, that where a seller's product ordinarily commands a higher price in the marketplace because of consumer preferences, he is beating, not meeting, competition when he lowers his price to equal that of his competitor's product, traditionally selling at a lower price.[60] Should not a similar principle apply in the converse situation: Where a seller finds that buyers have a preference for a competitor's product resting on other factors than price alone, should he not be permitted to charge a competitive price, one capable of overcoming such consumer preferences, even if it means "beating" his competitor's price?

Finally, the good faith defense has been seriously restricted by the doctrine that it can only be used "defensively" to retain old customers rather than "aggressively" to obtain a new customer or in anticipation of pricing practices of a competitor. Aside from the fact that the dis-

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[59] Tri-Valley Packing Ass'n, No. 7225, FTC, July 28, 1966; see also National Dairy Prods. Corp., No. 7018, FTC, July 28, 1966.

[60] Callaway Mills Co., No. 7634, FTC, Feb. 10, 1964; American Oil Co., 60 F.T.C. 1786, 1810-11 (1962); Anheuser-Busch, Inc., 54 F.T.C. 277, 302 (1957); see FTC v. Borden Co., 383 U.S. 637, 646-47, 657-58 (1966).

tinction is practically unworkable,[61] it does not make economic sense. How can it conceivably be consistent with a competitive philosophy that a seller is prohibited from competing in price with a rival in order to obtain new customers?[62] This doctrine has already been rejected by one court.[63] Nevertheless, the Commission apparently continues to adhere to it.

A real, and fundamental, conflict in public policy does exist with respect to the meeting competition defense. It cannot be resolved by reading unreasonable and inflexible standards into the defense. For the consequence is to deny the defense in situations where it should clearly be available as a means of protecting competition at the seller level. The task is to determine the relative values which we are to assign to the protection of competition at the seller level and to the protection of competition at the buyer level, and to strike an appropriate balance. Professor Edwards has stated the issue very clearly:[64]

> The policy of the law should be to reconcile so far as possible two objectives: freedom for businessmen to price their goods flexibly in response to the varying pressures of the market, and curbs on exercise of that freedom in ways that thwart the objectives of the statute as to competition and competitive opportunity. One may describe the reconciliation in different ways by placing primary emphasis on the one objective or the other. Thus, one may say that freedom of business price policy should be limited only for clear reason, or that the law should protect the public against the evils of price discrimination in a way that leaves as much freedom as possible. Under either formulation, what must be sought is a balance that reconciles the liberty of the enterprise with the continuance of liberty in the relationships among their enterprises and among consumers.

It is important that the question be brought out into the open and that a rational and considered choice be made.

VI. SECTION 2 (c)

No provision of the Robinson-Patman Act has been subjected to more attack than section 2(c)—the so-called brokerage section. En-

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[61] Austern, *Inconsistencies in the Law*, CCH SYMPOSIUM: BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS 158, 167 (1951); Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 970 (1951).

[62] 79 HARV. L. REV. 921, 924-25 (1966) (emphasis in original):

> How could any antitrust law be interpreted to mean that you can meet competition to hold an *existing* customer, but not to get new ones? Is that at all consistent ... with the Sherman Act which makes it a per se offense to allocate customers or to attempt to monopolize your own customers?

[63] Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962).

forcement of section 2(c) has been criticized not only as inconsistent with broad antitrust policies but as irrelevant even to the objectives of a price discrimination law. At one time, enforcement of the Robinson-Patman Act meant principally enforcement of section 2(c). Those days appear to be over.[65] And recent decisions by the Commission and the courts indicate that ancient dogmas are beginning to wither.[66] This may eliminate some of the more astonishing absurdities which were involved in earlier enforcement activities, and make the section a less inviting vehicle for an easy route to a cease and desist order. Nevertheless, old and cherished doctrines die hard.[67] Anomalies still occur, at least in treble damage actions.[68] There always exists the possibility that 2(c) may once again play a prominent role in Commission enforcement policy;[69] at all events, serious questions are raised about the utility or desirability of an absolute prohibition of this kind in the scheme of a price discrimination law.

Section 2(c) prohibits the payment of brokerage, or allowances "in lieu of brokerage," to the buyer or its agent "except for services rendered." The section was aimed at specific practices which existed in the food retailing industry at the time the act was passed. In order to avoid the prohibition on price concessions in section 2 of the original Clayton Act, large chain buyers used a number of devices for obtaining disguised indirect price concessions. One of these was to set up a dummy broker who in fact performed no brokerage services but was merely an agent of the buyer. The buyer would then demand that the seller pay "brokerage" to the dummy. In other circumstances the chain would simply demand that the seller pay it an allowance "in lieu of brokerage" on the pretext that it has saved the seller part or all of its brokerage costs. Again, no brokerage services would be

[64] EDWARDS 580.

[65] ROWE, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 ABA ANTITRUST SECTION REP. 9, 14 (1966).

[66] *Compare* FTC v. Henry Broch & Co., 363 U.S. 166, 173 (1960), *and* Central Retailer-Owned Grocers, Inc. v. FTC, 317 F.2d 410 (7th Cir. 1963), *and* Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962), *and* Edward Joseph Hruby, 61 FTC 1437 (1962), *with* Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945), *and* FTC v. Herzog, 150 F.2d 450 (2d Cir. 1945), *and* Modern Mkt. Serv., Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945), *and* Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir. 1938).

[67] See Flotill Prods., Inc., No. 7226, FTC, June 26, 1964, *rev'd on other grounds*, Flotill Prods., Inc. v. FTC, 358 F.2d 224 (9th Cir. 1966).

[68] Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

[69] Recently at a public hearing held before the Commission relating to the competitive effects of drop-shipping in the automotive parts replacement market, a proposal was made by one industry group that the Commission enter a new stage of Robinson-Patman enforcement in that industry via section 2(c).

performed, and very often the allowance to the buyer would come out of the pocket of a legitimate broker who, in such transactions, would receive no brokerage or would be required to share his brokerage with the buyer.[70]

The purpose of the brokerage section was to force these disguised transactions out into the open by imposing upon them an absolute prohibition. With respect to these practices, the act quickly had the desired effect. Very soon after its passage, chains changed their methods of doing business in an effort to conform to the provisions of section 2(c).

In fact, the history of enforcement under 2(c) has had very little relation to the practices which it was designed to condemn. It has been frequently noted that the main impact of 2(c) enforcement was not upon large buyers at all; it was felt rather by small sellers and buyers. In one series of cases it was used to cripple the activities of voluntary and cooperative buying groups designed to enable small buyers to compete with the large chains.[71] Ultimately, the main function of the section was to protect a single type of middleman, the "independent broker," against competition from other channels of distribution.[72] The Commission became an arbiter, determining which methods of transacting business were "legitimate" according to a standard which bore no relationship to their impact on competition.

This distortion of section 2(c) came about through the early devitalization of the exception provided for cases in which legitimate services were rendered, as well as through the erection of the dogmas that a "true broker" cannot serve two masters and that a buyer's agent could not perform legitimate services for the seller for which he was entitled to compensation.[73] In the buying group cases the voluntary wholesaler performed an important function in promoting the seller's private label goods to the members of the voluntary group. Yet, these services were ignored. In the garment industry, distributors

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[70] See FTC v. Henry Broch & Co., 363 U.S. 166, 168-69 (1960); Flotill Prods., Inc., No. 7226, FTC, June 26, 1964 (dissenting opinion), *rev'd on other grounds,* Flotill Prods., Inc. v. FTC, 358 F.2d 224 (9th Cir. 1966); F.T.C., *Final Report on the Chain Store Investigation,* S. Doc. No. 4, 74th Cong., 1st Sess. 62-63 (1935); ROWE 332-37.

[71] Independent Grocers Alliance Distribution Co. v. FTC, 203 F.2d 941 (7th Cir. 1953); Modern Mkt. Serv., Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945).

[72] ATTORNEY GENERAL'S REPORT 190.

[73] See, *e.g.,* Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945); Modern Mkt. Serv., Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir. 1938).

in various parts of the country, in order to maintain contact and keep in close touch with fashion and style changes at the center of the garment trade in New York City, find it necessary to maintain arrangements with so-called resident buyers whose offices are located in New York. These resident buyers perform a valuable function both for the seller and the buyer, bringing them together. In some instances the fee of the resident buyer is paid by the distributor, and in others by the seller. The resident buyer is in no sense a dummy; his activities bear no relationship to the activities of the chains which brought about passage of section 2(c); he in fact performs a valuable marketing and distribution function in the garment industry. There is no reason to believe that payment to the resident buyer by the seller discriminates in favor of large buyers or in fact results in any discrimination at all. There is certainly no evidence that the practice is in any way harmful to competition in the garment industry. Yet, the practice of payment by the seller has been held to be a violation of section 2(c).[74]

Similarly absurd results occurred in the Commission's cases against "buying brokers"—concededly legitimate and independent brokers who, in acting as intermediaries between small suppliers and small wholesalers, bought for their own account and took title to the goods. Ignoring the realities of the situation, the Commission held that such brokers, having taken title to the goods, were themselves the buyers and in receiving "brokerage" had literally violated section 2(c).[75] In summarizing the effects of these cases, Professor Edwards concluded that:[76]

> Viewed as a whole, the brokerage cases appear to include many that did not express the central purposes of the Robinson-Patman Act and that had effects partly inconsistent with those purposes.... Several... cases have forced voluntary chains and cooperatives to look for their income to other sources than sales commissions and to rely for their usefulness on service functions or co-operative buying rather than on an ambiguous agency relationship to buyers and sellers. This group of cases has done something to weaken the voluntary organizations in their struggle against the corporate chains. Two cases have prevented buyers from continuing to obtain market information at a discount, apparently with no other significant effect. In reducing the fluidity of the activities of buying brokers, several cases have substantially impaired the com-

[74] FTC v. Herzog, 150 F.2d 450 (2d Cir. 1945).
[75] Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945).
[76] EDWARDS 150-51.

> petitive strength of small wholesalers who are dependent on ... [less-than-carload lot] purchases and of the brokers who serve them, and probably have also weakened smaller producers in their competition with large producers.

Anomalous results, indeed, for a piece of antitrust legislation whose avowed aim is to protect the small businessman!

As I have already pointed out, the tide may have turned, and greater recognition seems to be accorded the view that a middleman rendering legitimate distribution services is entitled to compensation for those services, and that he should not be deprived of the compensation he has earned by labeling it "brokerage" or a payment "in lieu of brokerage."[77] Is it not time that we also reexamined the view that a buyer, even a large chain buyer, who in fact legitimately reduces the seller's brokerage costs through his methods of buying is not, as has been previously held, receiving an illegal brokerage payment when the price to him is reduced accordingly,[78] but is in fact receiving a legitimate reduction based on a cost saving to whose benefit both he and the ultimate consumer are entitled? Is it not time to re-examine section 2(c), and the proper function which a "phony brokerage" prohibition serves in the scheme of a price discrimination law?

VII. Section 2(d)

Section 2(d) of the act also raises critical questions of public policy, especially because of the increased enforcement activity under that section in the last few years. That section prohibits a supplier from granting advertising and promotional allowances unless such allowances are made available on proportionally equal terms to all purchasers competing in the resale of its products. Like section 2(c), it is a per se statute for which no proof of injury to competition is required and no cost-justification defense is available. Unlike 2(c), however, the courts, over the opposition of the Commission, have read the meeting competition defense into section 2(d). However, the adaptation of that defense to the context of promotional allowances has yet to be fully explored.[79]

There are a number of questions of current importance under sec-

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[77] FTC v. Henry Broch & Co., 363 U.S. 166 (1960); Central Retailer-Owned Grocers, Inc. v. FTC, 317 F.2d 410 (7th Cir. 1963); Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962); Edward Joseph Hruby, 61 F.T.C. 1437 (1962).

[78] Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939).

[79] See Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1961), appeal following remand, Trade Reg. Rep. (1965 Trade Cas.) ¶ 71491 (D.C. Cir. 1965).

tion 2(d), such as whether a supplier who makes advertising allowances available to large direct buying retailer customers must also make them available to its wholesale customers selling to retailers in competition with the direct buying retailers,[80] or, as I have suggested, to the retailer customers of such wholesalers.[81] These questions must be examined in the context of the fundamental purpose of 2(d) and the enforcement policy which has evolved under it.

The background of this section is similar to that of section 2(c). Section 2(d) had its origin in the view that many promotional and advertising allowances were forms for disguising price rebates. By making the prohibitions of 2(d) absolute, it was hoped to force such disguised rebates out into the open as price concessions where they could be dealt with under the price discrimination sections.[82] However, to treat all promotional allowances as disguised price rebates obviously conflicts with commercial realities. Cooperative advertising between supplier and distributor is an important and legitimate promotional device. Allowances which are part of such a program are certainly not disguised rebates. They are payments in compensation for legitimate and earned promotional services.

This fact raises two important questions. The first goes to the very heart of section 2(d) as enacted. Should a supplier be prevented from making maximum effective use of a restricted advertising budget through a selective cooperative advertising program, even where such a program in no way injures the competitive process? Take for example the case of a small dress manufacturer who has a small advertising budget. If he wishes to engage in a cooperative promotional program, the law requires him to make available any allowances on proportionally equal terms to all his customers. If it were not for section 2(d), a manufacturer in such circumstances would choose those retail outlets with the greatest prestige and confine his advertising to them. Obviously, an important part of the value of cooperative advertising to the manufacturer lies in the desirability of linking one's product with the name of a well-known and reputable retailer. To require him to give advertising allowances to retailers who cannot effectively promote his product, or, worse yet, to those whose public image he positively does not want to link himself with, is to require

[80] See Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966) (rejecting the Commission's position).
[81] See Fred Meyer, Inc., No. 7492, FTC, March 29, 1963 (dissenting opinion).
[82] Simplicity Pattern Co. v. FTC, 360 U.S. 55, 68-70 (1959).

him to allocate his advertising resources irrationally and uneconomically. Indeed, it also puts him at a disadvantage with his more powerful and larger competitors who may find that because of their superior advertising resources they need not engage in any cooperative advertising program. The rigid requirements of section 2(d), as currently administered, thus raise serious questions of public policy. Once again, Professor Edwards has put the issue clearly:[83]

> The general policy of the law in a free private-enterprise system is to leave buyers free to choose their sources of supply, to buy as much as they want from these sources in such proportions as they wish, and to pay the market value of what they buy. The application of these principles to purchasers of advertising would suggest that it is inappropriate to require a buyer of advertising service to buy it from all his customers if he buys it from any and to buy it from them in stated proportions to which proportionate values are arbitrarily assigned. One might, with similar logic, require a steel manufacturer to buy railway transportation service from every railroad in proportion, not to his need for service from each, but to the amount of his steel products purchased by each.

I do not suggest that this question of public policy raised by section 2(d) is simple or easily resolved. If a manufacturer may budget his cooperative advertising program so as to select those purchasers with the greatest prestige, the result may be to confer substantial competitive advantages on large buyers. But, at the present time, section 2(d) does not require any assessment of competitive impact. It seems to me, therefore, that the issue is drawn as to whether so serious an interference with a supplier's discretion in allocating his advertising resources is justified, in the absence of any inquiry whatsoever as to effect on competition. The utility of a per se approach in this area remains highly doubtful, at the very least.

Current enforcement policy under section 2(d) also raises a second and somewhat related question. In determining whether a program of promotional allowances is "available" on proportionally equal terms, the Commission requires that a program be *functionally* available to all customers. Some customers, because of the low volume of their purchases, might be entitled to allowances so small that they could not be used for certain advertising media, such as newspaper advertising. The Commission has taken an increasingly rigid attitude in this regard, insisting that a supplier, in order to meet the "availability" requirements, must offer his customers alternative promotional programs

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[83] EDWARDS 158-59.

which would be economically and functionally feasible for all customers.[84] This means that not only is a supplier not free to select the retailers with whom he will engage in cooperative advertising, but he is not free to choose the advertising media which have value to him. Indeed, as currently interpreted, 2(d) may require the payment of allowances for "promotional" services which are actually useless to the supplier, and, from the standpoint of selling his product, entirely worthless. I have recently pointed out that this approach is not required by the language, policy, or legislative history of section 2(d).[85] And, indeed, by requiring a misallocation of economic resources for wasteful or useless advertising, present enforcement policy may bring section 2(d) into direct conflict with the objectives of antitrust policy. This issue, too, requires thorough reappraisal.

VIII. ORIENTATION OF ENFORCEMENT POLICY

Perhaps the most critical question—one whose solution may obviate some of the problems that have been mentioned here—is how to reorient enforcement policy so as to focus on the central evil at which the Robinson-Patman Act was aimed, *i.e.*, the misuse of large buying power. The Robinson-Patman Act was passed "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."[86] In the words of its principal draftsman, "buying power is the source of the evil. The seller is merely an innocent victim compelled usually in self-defense to grant the concessions demanded."[87] From its inception, however, enforcement of the Robinson-Patman Act has been directed almost entirely against the seller.

In part, this derives from the failure of the original draftsmen who, although concerned mainly with buying power, constructed the act to emphasize prohibitions on discrimination by the seller. The heart of the act is in section 2(a). Even section 2(f) which is directed at the buyer, makes his liability turn upon whether the seller has violated section 2(a). Section 2(d) is perhaps the best illustration of the divergence between the provisions of the statute and its underlying purpose to curb the abuse of concentrated buying power. Although enacted to prevent big buyers from obtaining price rebates disguised

[84] House of Lords, Inc., No. 8631, FTC, Jan. 18, 1966.
[85] House of Lords, Inc., *supra* note 84, at 10 (dissenting opinion).
[86] FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960).
[87] *Hearing Before the House Committee on the Judiciary*, 74th Cong., 1st Sess., ser. 10, pt. 1, at 31 (1935), quoted in Grand Union Co., 57 F.T.C. 382, at 420 (1960).

as promotional allowances, it is in terms directed solely at the seller, saying nothing whatsoever about the buyer.

The Commission's efforts to remedy the oversight in section 2(d) may be especially instructive for any refashioning of the price discrimination law. In many instances suppliers are confronted with a uniform demand from a large chain buyer for discriminatory promotional allowances. Where such a demand is made of each of his competitors, and the business of the chain is vital for his survival, the supplier usually has no choice but to go along. But since, in such circumstances, each supplier may be meeting competition in good faith, he may have a complete defense to a section 2(d) charge. The Commission, recognizing both this dilemma and the fundamental objective of the Robinson-Patman Act to curb the abuse of large buying power, announced that the "enforcement policy best calculated to achieve the ends contemplated by Congress"[88] was one directed at the buyer inducing the discriminatory promotional allowances, through a proceeding under section 5 of the Federal Trade Commission Act.[89]

A proceeding under section 5 against the large and powerful buyer may not only remove the inequity of proceeding against the weak seller who is the buyer's victim. It may also eliminate the paradoxes generated by the meeting competition defense which were discussed earlier. Section 2(b), of course, recognizes a seller's legitimate interest in being free to take appropriate defensive action in a situation of competitive necessity. But where the Commission proceeds under section 5 against a buyer who, by the exercise of coercive power, is the very source of the competitive necessity to which each seller must respond, is it not anomalous to permit the buyer to invoke the shelter of the seller's good faith defense? And if enforcement of the act were primarily directed at the buyer, rather than the seller, would not that eliminate the policy tensions reflected in existing controversy over the meeting competition defense, namely, whether competition at one level should be protected at the cost of impairing it on another level? Finally, would not a section 5 approach directed at the abuse of buying power permit a more precise differentiation of those practices which impair competition from those which reflect the legitimate exercise of bargaining pressure upon which a competitive economy thrives?

To be sure, these questions are easier to ask than to answer. Legal

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[88] Moog Indus. v. FTC, 335 U.S. 411, 413 (1958).
[89] Max Factor & Co., No. 7717, FTC, July 22, 1964; Shulton, Inc., No. 7721, FTC, July 22, 1964.

rules unduly restricting buyers in exerting pressure for lower prices, especially where such lower prices are justified by efficiencies and economies in methods of buying, would harm competition. The Supreme Court has pointed out the importance of establishing standards which reconcile the objectives of section 2(f) of the Robinson-Patman Act with broader antitrust policies.[90] But the appropriate line is hard to draw. Recently the Commission has tried to revivify section 2(f); in my view, the impact of the actions it has taken has been felt largely in areas outside the central concerns of the act. The great majority of recent 2(f) cases have attacked the buying practices of relatively small jobbers who have banded together to form buying groups in the automobile repair parts after-market, possibly as a defensive measure against the competition of powerful chain buyers or the competition of the auto manufacturers themselves.[91] The jobbers involved in these cases are hardly the type of large buyers at whom section 2(f) was originally directed.

IX. Conclusion

The problems I have discussed do not exhaust the areas in which the Robinson-Patman Act and its administration may come in conflict with broader antitrust policy. But it should be clear, I believe, that reexamination of the law is urgently needed. In no field of the law more than in antitrust is it essential that the adequacy of existing rules and procedures be periodically reviewed. And no segment of our antitrust laws is more in need of such reappraisal than the Robinson-Patman Act. A dynamic, competitive economy, as Mr. Justice Fortas has recently reminded us, cannot afford a mechanical or sterile antitrust jurisprudence:[92]

> [A]ntitrust... is too important to be allowed to function as formula. Its effects upon our life are too profound for us to permit it to operate as mere ritual, without analysis of its impact, without fundamental reappraisal of its effect upon changing institutions, practices and problems, and without direction. There must be more to the administration of antitrust than a handbook on "how to do it"....

[90] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953).

[91] Alhambra Motor Parts, No. 6889, FTC, Dec. 17, 1965 (appeal pending in the Ninth Circuit); National Parts Warehouse, No. 8039, FTC, Dec. 16, 1963, *aff'd sub nom.* General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir. 1965); Mid-South Distribs. v. FTC, 287 F.2d 512 (5th Cir. 1961), *cert. denied,* 368 U.S. 838 (1961); American Motor Specialties, Inc. v. FTC, 278 F.2d 225 (2d Cir. 1960), *cert. denied,* 364 U.S. 884 (1960).

[92] 30 ABA Antitrust Section Rep. 131, 134-35 (1966).

> [O]ne would hope that, by now, it would be possible really to survey the past, to appraise the present and to consider the future in terms of the effect of antitrust policies, theories and practices as they are and as they might be modified....
>
> I know that fear is one of the factors inhibiting economic and policy diagnosis and prognosis of antitrust. Everybody is afraid he will be worse off if the realities of antitrust are confronted.... [B]ut, after all, democracy is the art of living dangerously, and antitrust is exceedingly democratic. And as I see the vast changes that have taken place in production, distribution and consumption—and the even greater changes that are imminent—I become more convinced than ever that we cannot providently continue to play the game of antitrust-in-the-dark. I hope that if and when light is brought to bear upon the economic and social effects of antitrust, it will disclose that there is no reason to abandon or weaken the fundamental policy of insisting on competition. I should hope, indeed, that it would lead to reexamination of our theory of competition and to the illumination of methods and standards by which that theory can be more effectively—and constructively—applied.

It is in this constructive spirit that a review and reappraisal of the Robinson-Patman Act and its administration should be undertaken.